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IN THE

Supreme Court of the United States

October Term, 1959

No. 412

ELMO M. BADON,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Elmo M. Badon, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on July 15, 1959.

CITATIONS TO OPINIONS BELOW

The verdict of the jury in the United States District Court for the Eastern District of Louisiana was reviewed by the United States Court of Appeals for the Fifth Circuit and judgment herein was rendered on July 15, 1959. Rehearing was denied August 25, 1959. The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, infra, P. , is reported in . . . F.2d . . .

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Entrapment of the appellant by federal law enforcement officers has in fact produced a crime and conviction. By any criteria of entrapment, the conduct of the Customs officials in this case should not be constitutionally condoned. And even more specifically, the conduct here reported falls far below the standards to which common feelings respond for the proper use of Governmental power.

At every legal opportunity the defense repeatedly asked the trial and appellate courts to rule that as a matter of law entrapment had been established. The question presented is whether error has been committed by the repeated failure of the lower courts to accept this responsibility and recognize the obvious invasion of constitutional rights.

2. Does the appellant Badon have to stand convicted because no court below would accept the responsibility of determining whether or not this prosecution was the product of the creative activity of law enforcement officials, or the product of police conduct below the standards, to which common feelings respond for the proper use of governmental power?

STATUTES INVOLVED

The statutes involved are as implemented by 18 U.S.C. 371. Conspiracy to Commit Offense or to Defraud United

States, and 18 U.S.C. 545. Smuggling Goods into the United States. The complete section is printed in Appendix B, Infra pp.

STATEMENT

On May 19, 1958, appellant, Elmo M. Badon, was jointly indicted with Richard Von Kehler and Hans Georg Fabian for smuggling and exporting merchandise into the United States and conspiring together with his co-defendants to commit the same in violation of Title 19, Sections 1448 and 1453, and Title 18, Section 545, United States Code.

On May 21, 1958, the defendants Richard Von Kehler and Hans Georg Fabian were arraigned and each, after having signed a waiver of counsel, entered pleas of guilty. At the same time the defendant, Elmo M. Badon, entered a plea of not guilty. The matter of sentencing the defendants Richard Von Kehler and Hans Georg Fabian was continued.

On June 20, 1958, the defendant, Elmo M. Badon, moved for a dismissal of the indictment and made application for a bill of particulars. On July 14, 1958, the United States of America complied with the defendant's application in part. On July 23, 1958, in a hearing on defendant's motions to dismiss and for bill of particulars said motions were denied by the trial judge.

On August 6, 1958, the defendant, Elmo M. Badon, moved to suppress evidence consisting of 109 bottles of scotch whiskey in that they were unlawfully seized by agents of the United States Treasury Department, Bureau of Customs.

On August 20, 1958, the defendant's motion to suppress was denied.

On August 21, 1958, the defendant, Elmo M. Badon, was tried and convicted in a trial by jury on Counts 3, 4, and 5 of the indictment. On September 3, 1958, the defendant, Elmo M. Badon, was ordered committed to the custody of the Attorney General for a period of 18 months on Count 3 and fined the sum of $1,000. A similar sentence of 18 months was imposed on Counts 4 and 5, the sentences imposed on Counts 4 and 5 to run concurrently with that imposed on Count 3.

On September 3, 1958, the defendant, Elmo M. Badon, filed a notice of appeal.

On November 21, 1958, the defendant, Elmo M. Badon, filed a motion to designate and transmit for inclusion in the record on appeal the complete record and all proceedings and evidence in this action, including all exhibits; an order to that effect was subsequently signed by the trial judge.

On July 15, 1959, the United States Court of Appeals for the Fifth Circuit affirmed the decision of the lower court.

On August 4, 1959, a petition for rehearing was filed in the United States Court of Appeals for the Fifth Circuit.

On August 25, 1959, an order was entered denying the application for rehearing.

On August 27, 1959, petitioner, Elmo M. Badon, applied for a stay of mandate pending an application to the Supreme Court of the United States for a Writ of Certiorari.

On August 31, 1959, the United States Court of Appeals for the Fifth Circuit entered an order staying its mandate for a period of thirty days or until final disposition by the Supreme Court of the United States.

REASONS FOR GRANTING THE WRIT

Bourbon Street in New Orleans for almost three hundred years has been the trading center of those of sporting blood. Bourbon Street has witnessed just about all of the illicit traffic known to the men of this and other generations. The corsairs, pirates, riverboat gamblers and cutthroats have all been replaced with their twentieth century counterparts, many of whom live constantly on the fringes of legitimacy. Needless to say the Street is one of suspicion. Whatever commodity is sold by night on Bourbon Street is in this day viewed with the same distrust as was the dealings of our colonial ancestors with the pirates in the thieves market right off the very same Bourbon Street. Needless to say those merchants of the Bourbon Street commodities who survive over a period of years are indeed a wary race.

Elmo Badon, the appellant, has been part of the Bourbon Street scene for many years. He, over this period, has always been the owner or manager of one of the many establishments that line Bourbon Street from one end to the other. With ever increasing law enforcement and administrative controls, the operators of the Street's attractions have become more and more wary. No one need remind

the Bourbon Street operators that one mistake could "take them off the street", and for this group there is no greater penalty. With this background it must here be conceded that only an unbelievable effort by the law enforcement agencies could tempt the appellant to join a conspiracy with foreign nationals to smuggle illicit cargo into the very heart of the New Orleans Vieux Carre.

The government case does not rest upon a completed crime, but merely a conspiracy. A conspiracy between two twenty-year-old German seamen and a Bourbon Street night club operator. Badon, the defendant, never laid eyes on one of the three conspirators until he appeared as a government witness in the trial of this matter. The other so-called conspirator first appeared alone and drunk in the Badon establishment some twenty-four hours before the government made the raid, the arrest, and the charge. It is absolutely beyond the realm of reason to read out of this record that Badon and the drunken German seaman then and there entered into a conspiracy to illegally smuggle a hundred odd bottles of Scotch whiskey into the United States. The Fifth Circuit Court of Appeals pointed out the evidence must be viewed ". . . in a light most favorable to the government." Very well, look at this meeting between the drunken seaman speaking English with some difficulty, and the experienced operator of a Bourbon Street night spot. Perhaps Badon was polite and even interested in what the seaman had to say, but with no merchandise, no established price, no sample, and no delivery date or plan — who can view this meeting and conclude more than Badon told the seaman that he would "look" at the merchandise.

Logic and reason likewise indicate that even the drunken seaman in his attempt to sell this merchandise did not, and would not jeopardize a possible sale by saying the goods he wanted to sell were stolen or smuggled.

It is from this point, to the time of arrest that the conduct of the federal law enforcement officers falls below standards, to which common feelings respond for the proper use of governmental power.

This we must emphasize: Badon had made no deal, no quantity or price had been established and no delivery plans had been formulated. If one, two or three people conspire to smuggle anything, anywhere, anytime, the actual delivery is the key to the entire operation. Plans for the delivery of this contraband were never discussed with, or considered by the defendant Badon. No system of law exists which would condemn Badon for the obvious conversation he held with the drunken German seaman on the night before his arrest.

But what happened after this drunken seaman walked out of the Bourbon Street night club. Very simply stated, he eventually returned to his ship, got a fellow seaman to help him load the contraband liquor into suitcases and proceeded down the gangway to a waiting cab. Here the two seamen were apprehended, and here the government took complete control. Each and every act of the alleged co-conspirator Von Kehler was thereafter directed by federal law enforcement officers. Von Kehler had been born in Germany and had spent almost all of his twenty years under the rigid disciplines of the Nazis and their eventual conquerors. Von Kehler's impressionable years were en-

twined with history and the authority of totalitarian might. A careful reading of the record of the arrest will show that part of the res gestae of this arrest indicates that the two Germans as of the time of this arrest stated that the ultimate destination of the contraband was indefinite even as of that time.

Then the government very properly seized the contraband liquor and marked it as property of the United States Government. Now observe the product of the creative activity of law enforcement. The incipiency of this offense takes place almost immediately. After the contraband had been marked and logged, someone ordered the government marks erased from each bottle of liquor. (Von Kehler was in custody, and Badon was miles away). Then follows a series of events which must shock the common concept of the proper use of governmental power.

Von Kehler was not brought before the United States Commissioner on the following morning, instead here begins the bizarre story of the use of a foreign national prisoner of the United States in the manufacture of a crime. The federal agents took Von Kehler from the Orleans Parish Prison, talked to him for a while in the Custom House in New Orleans, took him to a private restaurant, and then moved him out of the City of New Orleans into the neighboring Parish of Jefferson and placed him in a plush motel. Von Kehler was permitted to sleep until a late hour on the second day. When he awakened, he found a meeting of most of the Custom officials of the New Orleans area. There was some discussion of "plans" and Von Kehler was taken to the Custom House in New Orleans where the contraband was waiting for him. (The original government markings placed on

each bottle of liquor had now been completely removed.) This contraband was then loaded into a taxi cab with Von Kehler and a federal agent. The taxi driver was then directed to the establishment of the defendant Badon. Both of the German seamen had at one time stated that it was their intention to dispose of the contraband either at the Badon establishment known as the "Moulin Rouge" or at another night club known as "Moses 'N' Bulrushes." Customs agent Green unequivocally testified that it was he who made the decision to go to the Badon establishment instead of the alternate location. He said "I was in the position of any juror in any case, balancing the facts as they were presented, and judging the truth."

Here, appellant notes that the ex parte determination of where and upon whom the concentration of federal police power is to be placed is a decision of some consequence to appellant. But, admittedly law enforcement cannot be all places at all times and perhaps such decisions must be made — however, appellant would not now be facing a prison term unless the decision had been made. Certainly to concede to Agent Greene the right to make such a decision under the circumstances must in fact subject his ultimate decision to very close scrutiny.

This scrutiny is what appellant asks of this Honorable Court. Like everyone else he believes that a conspiracy must mean an understanding expressed, implied or understood. How in the name of reason can this conviction remain when an authorized federal law enforcement agent admits that he decided to deliver this hot cargo to the appellant Badon instead of to another recipient suggested by his very special prisoner.

The federal agent, his prisoner and the hot cargo arrived at the Badon establishment at the height of the business day — which on Bourbon Street is midnight. They entered through the front entrance and approached Badon. The federal agent in a minimum disguise posed as a German seaman unable to speak English. Despite this cover the agent overheard only the simple commitment of Badon to the effect that he would look at the liquor.

Here it is noted that the federal agent apparently was not satisfied that this casual contact with Badon produced any evidence of a conspiracy. Badon had not acknowledged any previous understanding or meeting — the goods had not been identified as smuggled or even stolen — no price was discussed — no delivery was made — and as to the foreign origin of the contraband nothing can be implied from the mere fact that Scotch whiskey came from a source outside the United States — for this is universally true.

The "creative activity" of the federal agent, if not discernible before now becomes obvious, for at his direction the captured German native and he physically carried the contraband into the rear of the Badon establishment, thus giving the agent the opportunity to reinstruct his prisoner.

Surprisingly enough the federal customs agent readily acknowledges that at this time, out of the presence of Badon, he instructed his prisoner to tell Badon the goods were STOLEN. It cannot be overemphasized at this point that here is a void that must be filled by a presumption to establish the guilt of Badon. The prisoner may or may not have followed his cue and told Badon the goods were stolen, (appellant strenuously denies that the record establishes

this fact) but nowhere, no how did anyone ever suggest smuggling or contraband. This conviction rests upon the assumed premise that stolen goods are smuggled goods, if they are in the possession of one who appears to be a foreign seaman.

The standards of police conduct are shocking not only because of the disregard of the rights of the individual, but also from a purely technical appraisement. The federal agent and his prisoner carried the government contraband into Badon's place — the liquor was taken from suitcases and counted — Badon walked outside the room for a minute and was arrested on his return. Certainly, the execution of the well rehearsed plan was badly timed for it is most doubtful whether or not the government property was ever delivered, or whether it had been received by Badon. Definitely, he did not pay for it. — definitely, there was no agreed price, and who can believe that a transaction such as this could ever be anything but C.O.D.

The most elemental analysis would "in the light most favorable to the government" suggest that Badon perhaps completed the purchase of stolen liquor — a matter of very questionable federal cognizance. The site of the proposed purchase was his place of business and the time of delivery was unusual but understandable. His concern about possible conflict with federal law was dispelled when he saw the official Internal Revenue Stamps on each and every bottle. He, like most everyone in this country had a right to presume the official federal tax stamp evidenced the fact that the federal tax had been paid. The trial judge thought so. The record shows that he addressed the prosecution and asked:

"What difference does it make where you buy it? (the liquor) You might know you're buying stolen merchandise but if it has stamp on it you'd be justified in believing the tax was paid."

Unfortunately the zealous and eager tax collecting facilities of government have destroyed the purpose for which the revenue stamp was devised. It no longer signifies that its attachment to an object is the government certification that the assessed tax has been paid. The trial judge was wrong, and Badon was wrong.

Every circumstantial fact, we concede, may rightfully be examined to establish the inchoate intent or conspiracy. This is what appellant asks of this Honorable Court — there can be but one conclusion — if on the night in question a plot existed to violate our customs laws of the United States — Badon was unaware of it and an unconscious conspiracy is not punishable in a country that constitutionally respects the rights of the individual man.

2. With the foregoing background the completion of this constitutionally questionable prosecution is readily understandable.

At their very first appearance in Court the two Nazi bred Germans said "ya" they were guilty of all counts, and Badon heard the trial judge say that he would not sentence the Germans until after Badon had been tried. Naturally, in the subsequent trial of Badon the two Germans appeared and testified as the only witnesses who could purport to implicate the appellant Badon. Here in the interests of appellant two facts must be recorded:

1) Both Germans when testifying in the trial of this matter made statements in conflict with previously recorded testimony.

2) Agents of the Customs Service admitted from the witness stand that long after they had turned this matter over to the United States Attorney for prosecution, and only a few days before trial, they had visited the two Germans in the Parish Prison in New Orleans.

So Badon went to trial, and the trial court under the authority of existing jurisprudence repeatedly ruled that the jury, and not he would have to decide whether or not Badon was the scapegoat of illegal law enforcement.

Thus an American citizen is forced into a trial in an American court where in order to defend himself and his constitutionally guaranteed rights he had to:

1) Acknowledge that the crime with which he has been charged has in fact been committed.

2) Then prove to the complete satisfaction of jury that he did not conceive and commit the crime but that it was in fact committed by supposedly trustworthy and honored members of federal law enforcement.

This we believe is an insurmountable burden and in fact tends to rebutt the most sacred of constitutional rights — the presumption that everyone is innocent until proven guilty.

This is no new thought — the Prohibition case of Sorrells v. United States in 287 U.S. 435, 77 La. Ed. 413, 53 S.Ct. 210, 86 ALR 249, long ago pointed out the controversial question of whether the court or the jury should decide the issue of entrapment. Recently in this Court it appeared that a new evaluation of the law of entrapment had been seriously considered, but the court majority declined to rule on a question not presented by the parties to the litigation. This application is presented on the premise that here we have an opportunity to properly present to this Court an opportunity to re-assess the doctrine of entrapment.

The brilliant dissenting dissertation of Mr. Justice Roberts on the fundamental concepts of the individual's inherent right to protection by the courts from improper police authority has cast some doubt on the propriety of the judicial shirking of this responsibility.

The accumulated doubt of twenty-seven years was re-expressed recently in Sherman v. United States, 356 U.S. 369, 2 L. Ed. 2d 848, 78 S.Ct. 819. Therein appellant believes is the expression of four justices of this court to the effect that the responsibility of defending the individual against oppressive police methods is a matter of basic law inherently vested in the courts.

Also therein appellant believes is the expression of five other justices to the effect that they do not deny the wisdom of re-assessing the doctrine of entrapment, but hold that such re-appraisal should be made only when properly raised. Thus four sitting justices apparently believe that entrapment is a matter of law for the courts, and five justices sitting at the time of the Sherman case apparently

await only a proper presentation to express their conviction. Appellant's hopes rest upon the proper presentation of this issue.

This application should be granted because if an innocent American citizen becomes the victim of "frame" by police officials he can under our existing jurisprudence:

1) Know that he at least can have this injustice tried by a jury. But that he must first go to trial, admit the commission of the crime, and then try to prove to the jury that someone else conceived and committed the crime.

2) Or, he may hope that he may be spared the apparent obligation of proving his innocence. The sentiments of the four justices concurring in the Sherman matter may now express the law of the land, for none of the five majority votes can be construed as a refusal to re-appraise the questionable doctrine.

3) Or, even if he has made a faulty appraisal of the Sherman majority — confusion still exists as to his rights, for a justice counted in the majority opinion is no longer a member of this Court.

Appellant sincerely believes that this most basic of individual rights should be defined in such terms as would give all people the confidence of knowing their constitutional rights against the very real and dangerous hazard of police oppression.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17417

ELMO M. BADON,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(July 15, 1959.)

Before HUTCHESON, Chief Judge, and CAMERON and BROWN, Circuit Judges.

CAMERON, Circuit Judge: The questions presented by this appeal are whether the record contains sufficient evidence to sustain the verdict of the jury in the lower court; the propriety of the submission of the entrapment issue to the jury over defense contention that the evidence reflected entrapment as a matter of law and that the issue should have been so decided by the court; and whether re-

versible error was committed in the Government's alleged failure to make available to the defense statements of government witnesses prior to their cross-examination. Appellant-defendant was tried to a jury in the district court and found guilty of conspiracy to commit an offense against, or to defraud the United States[1] and of receipt and concealment of merchandise brought into the United States contrary to law[2] and was sentenced to imprisonment under each of three counts of the indictment, said sentences to run concurrently.[3]

The determinant facts, as established by the jury's verdict, are simple and are based upon evidence undisputed except as the testimony given at the trial may have varied from statements of the witnesses extracted from the Government's files. On the night of April 30, 1958, two German seamen, Von Kehler and Fabian, were apprehended by the United States Customs Officials on the Mandeville Street Docks in New Orleans, La., loading suitcases containing

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[1]Title 18 U.S.C. §371: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined . . . or imprisoned . . . or both."

[2]18 U.S.C.A. §545: ". . . Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

"Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

"Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section."

[3]Count 3 covered receipt of the whisky and the sentence was for 18 months plus a fine of $1,000.00; Count 4 covered concealment of the whisky and the sentence was for 18 months; Count 5 covered conspiracy and the sentence was for 18 months.

Scotch Whisky into a taxicab. It was developed without dispute that the whisky contained no Louisiana tax stamps, that the federal tax had not been paid, and that the whisky had been brought from a ship into this country contrary to the laws and regulations governing the importation of merchandise, with the intention of selling the same to one of the night spots on Bourbon Street in New Orleans.

The officers seized the whisky, taking it to the Customs Building, and arrested the two seamen and took them to the same place for interrogation. They were questioned at length there and subsequently taken to the parish prison. The questioning continued during the following day. *The seamen were disposed at first to deny that the whisky was destined for any particular club, but Von Kehler finally admitted that a definite agreement had been made with appellant that the whisky would be delivered to him at the Moulin Rouge.* The officers then agreed with the two seamen that Custom Agent Hunton would accompany Von Kehler and that the whisky would be delivered to the Moulin Rouge on the night of May 1st.

Shortly after midnight of May 1st, Von Kehler and Hunton took the whisky by taxicab to the Moulin Rouge. The two entered the night club and proceeded to where appellant was standing behind the bar. Von Kehler introduced Hunton as his companion, a German seaman who could not speak English, and explained to appellant in Hunton's presence that the delay in making delivery of the whisky was occasioned by the difficulties they had encountered in getting the whisky from the ship to the docks. *During the course of this conversation Von Kehler brought out that the whisky was that which had been stolen from the ship*

and that it bore no Louisiana tax stamps. Nevertheless Badon agreed to purchase the whisky and directed that Von Kehler and Hunton bring it through a public portion of the club, through a door behind the bar into a secreted back room.

Von Kehler and Hunton proceeded to the taxicab and brought in the four suitcases containing the whisky and, pursuant to directions, took it into the back room where Badon was waiting. At his direction the door to the room was kept closed, as he did not want the girls or other employees to see what was going on. By appellant's direction, the whisky was removed from the suitcases and placed, some on a table and some on the floor of the back room. *Badon was proceeding to another portion of the night club to get the manager to come and agree with Von Kehler what he would pay for the whisky* when other government agents stationed in the night club arrested him before the actual sale was consummated.

The first error argued by the appellant is the refusal of the court below to grant his motion for acquittal on the ground that the verdict of the jury was not sufficiently supported by credible evidence. We cannot agree with this contention, being convinced from a reading of the evidence that it was clearly adequate to support the conviction. In resolving questions concerning such sufficiency, this Court is bound to take the view of the evidence most favorable to the Government, and must give the Government the benefit of reasonable inferences that the jury may have drawn therefrom. *Rickey v. United States*, 5 Cir., 1957, 242 F.2d 583; *Ingram v. United States*, 5 Cir., 1957, 241 F.2d 709,

certiorari denied 353 U.S. 984, and *Lemien v. United States*, 5 Cir., 1946, 158 F.2d 550.[4]

With respect to the conspiracy count, we do not think that it was essential for the Government's proof to show that appellant actually agreed in terms with Fabian and Von Kehler to have a common design and to strive to accomplish it by the same means. It is sufficient if, from the evidence, it appeared that the appellant acted in furtherance of *the same illegal object as the other two*. Under this test the evidence placed before the jury was sufficient to justify its conclusion that the appellant was engaged with the seamen in a conspiracy to effect that object.[5]

The theory of the prosecution was that Badon knew, or was sufficiently advised that the merchandise was contraband brought into this country contrary to law. The jury had before it competent evidence tending to establish: that an agreement was reached, April 30th between Badon and Von Kehler under which Badon contracted to receive with the view of purchasing over 100 bottles of this whisky; that Badon recognized Von Kehler when he and Agent Hunton arrived at the Moulin Rouge with the whisky; that he was advised that difficulty had been encountered in bringing the whisky ashore; that he directed that the whisky be taken to a back room of the club and the door closed to prevent the female employees from viewing the transaction; that appellant was told at the time of delivery that

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[4] And cf. Gendelman v. United States, 9 Cir., 1951, 191 F.2d 993; Miller v. United States, 8 Cir., 1943, 138 F.2d 258, certiorari denied 320 U.S. 803; and Butler v. United States, 7 Cir., 1943, 138 F.2d 977.

[5] Duke v. United States, 5 Cir., 1956, 233 F.2d 897; Beland v. United States, 5 Cir., 1938, 100 F.2d 289; and cf. Marino v. United States, 9 Cir., 1937, 91 F.2d 691.

the whisky had been stolen and that it bore no Louisiana tax stamps, *this being confirmed by Badon's statement to* Custom Agent Crawford at the time of his arrest; and, finally, that Badon took possession of the smuggled goods and participated in their concealment.

A jury may reasonably infer the existence of an agreement and joint responsibility of a defendant in a prosecution for conspiracy from any substantial evidence that the defendant acted in furtherance of it with knowledge of the existence of an unlawful enterprise. *Pullin v. United States*, 5 Cir., 1939, 104 F.2d 57; and cf. *Alexander v. United States*, 8 Cir., 1938, 95 F.2d 874; *Diehl v. United States*, 8 Cir., 1938, 98 F.2d 545.

In this case, it is clearly deducible from the evidence, taken in a light most favorable to the Government, that Von Kehler and Fabian, acting in concert with the defendant, confederated to accomplish a criminal purpose in violation of 18 U.S.C.A. §371, Note 1, *supra*.

The jury's verdict on the receipt and concealment counts, we think, is also clearly supported. The evidence detailed above warranted the jury in finding that all of the elements of receipt and concealment were present, and, moreover, *the appellant took actual possession of the whisky*, which alone is sufficient to support the conviction unless explained to the satisfaction of the jury. See Note 2 *supra*, and *Tomplain v. United States*, 5 Cir., 1930, 42 F.2d 203, certiorari denied 282 U.S. 886. Here, no explanation at all was offered. Cf. *Ahrens v. United States*, 5 Cir. 1959, 265 F.2d 514, 517.

The receipt of the smuggled whisky with knowledge of its contraband character, as charged in the third count, was established by the clearest sort of evidence and conviction under it alone would warrant the sentence imposed even if the proof were not adequate to support conviction under the other two counts. We think the attack upon the sufficiency of the evidence is without merit.

The burden of appellant's argument is that the various statements and documents turned over to appellant under the Jencks rule so conflicted with the testimony given by the witnesses before the jury that their testimony in open court was not sufficient to provide a stable support for the jury's verdict. It is not our duty to weigh the evidence or to pass upon the credibility of witnesses. We are called upon to determine only whether there is substantial evidence, viewed from its most favorable aspect, to support the jury's verdict. *Glasser v. United States,* 1942, 315 U.S. 60; *French v. United States,* 5 Cir., 1956, 232 F.2d 736, certiorari denied 352 U.S. 251; and *Lloyd v. United States,* 5 Cir., 1955, 226 F. 2d 9.

What appellant obtained from the Government's file disclosed, it seems to us, nothing more than a reluctance on the part of the seamen to tell the full story during the early stages of their interrogation. But the story they finally told, as revealed in their statements to the officers, was not unreasonable and was not so inconsistent with the testimony given by them on the witness stand that it can be characterized as unbelievable. The jury heard their testimony, as well as their statements made to the government officials, and evidently accepted the testimony they gave from the witness stand.

Nor is appellant's argument on the question of entrapment any more convincing. Relying heavily upon *Sherman v. United States*, 1958, 356 U.S. 369, appellant takes the position that the evidence in this case shows that his defense of entrapment is good as a matter of law.

We do not think so. *Von Kehler testified categorically that Badon had agreed to purchase the liquor knowing that it was contraband before he or the other sailor had any contact with government officials.* (The two had participated in a similar transaction on a former occasion.) Von Kehler and Fabian were engaged in making delivery pursuant to that agreement when they were apprehended by the officers. The Government merely permitted the seized liquor to be delivered the following night; substituting one of its own agents for the second German seaman. We find nothing reprehensible in this action. In *Sorrells v. United States*, 1932, 287 U.S. 435, 441, it is said: "It is well settled that the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises;" and in the separate opinion of Mr. Justice Roberts (p. 453) it is stated: "Society is at war with the criminal classes, and courts have uniformly held that in waging this warfare the forces of prevention and detection may use traps, decoys, and deception to obtain evidence of the commission of crime . . ."

This rule is not repudiated or weakened in *Sherman*, and any purpose to do so is specifically disavowed. Entrapment is given effect as a defense only when the law officers en-

visage the crime, plan it and activate its commission by one not theretofore intending its perpetration; or where the officers pursue tactics which offend common concepts of decency. We have no such situation here, and the court below submitted the defense of entrapment by proper instructions and the jury found the issue against the appellant and it was amply warranted in doing so. Cf. *Latham v. United States*, 5 Cir., 1958, 259 F.2d 593; *Accardia v. United States*, 5 Cir., 1958, 257 F.2d 168; and *Kivette v. United States*, 5 Cir., 1956, 230 F.2d 749.

This brings us, finally, to the two questions argued by appellant based upon his contention that he was erroneously denied production of the Government's file and certain documents there in contravention of the decision of the Supreme Court in *Jencks v. United States*, 1957, 353 U.S. 657, and the Jencks Statute, 18 U.S.C.A. §3500.[6]

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[6]The Statute provides:

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement

In connection with said decision and Statute, the decisions of the Supreme Court of the United States rendered June 22, 1959 should be considered.[7]

The former of the two points made by appellant is that the court below erred in not making all statements of Von Kehler and Fabian available to the defense prior to their

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which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement,' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means--

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

[7]No. 489 and 491, Oct. Term, 1958, Pittsburg Plate Glass Company v. United States, and Galax Mirror Company, Inc., et al. v. United States . . . U.S. . . .; No. 471, ib., Palermo v. United States, . . . U.S. . . .; and No. 451, ib., Rosenberg v. United States, . . . U.S. . . .

cross-examination. As to Von Kehler, the two statements made by him were turned over to appellant prior to his cross-examination. During the trial a report made by Customs Agent Hunton, who accompanied Von Kehler to the Moulin Rouge, was also turned over to appellant, and Von Kehler was thereupon tendered to appellant for further cross-examination. This tender was declined. The testimony also disclosed that appellant had taken a statement from Von Kehler while he was in prison and before the trial.

The evidence shows clearly that Custom Agent Hunton's memorandum was made after his conversations with Von Kehler, and was not a "statement" under subdivision (e) of the Statute, and the Government was not required to submit this document to appellant, and no error can be predicated upon the timing of such submission. At all events the offer to submit Von Kehler for further cross-examination after delivery of this memorandum would cure any error if one had been made.

As to witness Fabian, the one statement he made was turned over to appellant, but not until after Fabian had left the stand. Appellant had not requested Fabian's statement after his cross-examination, but his failure to do so doubtless arose from the fact that the Government had volunteered to turn over all statements of witnesses it proposed to use prior to the time Fabian was offered as a witness, and it inadvertently failed to include Fabian's statement in those then turned over to appellant. Fabian, too, was tendered for further cross-examination after his statement was delivered to appellant, but the offer was not accepted. The point is wholly without merit.

Appellant's second point as to delivery of statements and other documents from the Government's file charges that the trial judge erred in refusing "defendant's request to make an in camera inspection of agents' report for oral statements made by government witnesses."[8]

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[8]At the end of Von Kebler's direct examination defense counsel stated:

"If your Honor please, at this time, since the Government has relinquished the witness, we would like to be furnished with any statement, written or oral, that was made by this defendant within the course of the investigation . . .

THE COURT:

All right.

MR. PASTOREX:

"I am handing you now the original of two statements: one dated May 1, 1958, and one dated May 6, 1958.

BY THE COURT:

Let the record show that the Government has furnished counsel with the statements. Is that correct?

MR. TALBOT:

Yes sir. . . . May I ask the Court to request the United States Attorney a copy of any oral statements that might have been issued by the defendant in this matter, a resume of those statements . . .

THE COURT:

Do you have any resume?

MR. PASTOREX:

I have no resume of any oral statements. Those are the only statements I have any knowledge of.

MR. TALBOT:

We also request to be furnished all copies of agents' reports, the originals rather of agents' reports in this matter, to conform with the Supreme Court decision in Jencks v. United States.

THE COURT:

Well, I don't believe Jencks holds that at all. I have never believed that it held that and I deny the application."

When court reconvened after recess the following additional colloquy took place after the court asked if the litigants were prepared to go forward:

"MR. TALBOT:

Yes, we are, Your Honor, except that we've not be [sic] handed any resume or oral testimony or report.

THE COURT:

They've said they had none.

MR. TALBOT:

Well I certainly don't know.

THE COURT:

They have no summaries of oral reports — oral statements.

The only government agents having any knowledge of or connection with the facts upon which the conviction rests or of the statements of witnesses as reflected by the record, were Hunton, Green, Crawford, Schorr and Signorelli. As stated, Agent Hunton's memorandum was turned over to the appellant, and one page of Agent Crawford's memorandum was submitted to and read by appellant's counsel. Crawford's memorandum did not come within the reach of the statute, and appellant had no right to see any part of it.

Neither party questioned Agent Green while he was on the stand with reference to any statements given by witnesses, and Agents Schorr and Signorelli, whose connection was that they arrested the two seamen, took no statements and made no notes; and any report they might have made would be beyond the ambit of the Statute.

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MR. PASTOREX:

Your Honor, the only thing we have is a summary report of the entire case. Now in it there probably exist, in parts, statements by all types of people, who ever began [sic].

THE COURT:

Let me ask you, were his oral statements reduced to his report, a written statement that he signed or furnished:

MR. PASTOREX:

The oral statements he made were reduced to writing and are—the defense has an original and a copy of those statements.

MR. TALBOT:

Does that contain all the oral statements?

MR. PASTOREX:

So far as I know that contains all the oral statements other than statements made to me.

MR. TALBOT:

If Your Honor please, I don't mean to be picayunish about the whole thing, but if there are oral statements—I mean, I'd like the record examined."

In considering whether the court below committed error in declining to make the plenary inspection of the file demanded by appellant, it should be kept in mind that the production of statements is governed solely by the Jencks Statute, that the Statute requires delivery only of the statements of witnesses who testify, that such statements are obtainable only by a motion made by the defendant, and that the sole object of delivery of the statements is to enable the defendant to impeach the testimony of witnesses used by the Government. We do not think that the record made by appellant justifies the charge of error on the part of the trial judge in dealing with this aspect of the problem.

A motion contemplates the putting on of proof, initially by the movant, and a ruling by the trial court based upon the proof. As a practical matter, the question of whether a litigant has in its possession the documents called for by such a motion is settled by statements made in open court by its attorney. Such is an easy and dependable method, and such statements made by attorneys are seldom questioned, they being officers of the court whose status is comparable to that of the judge. Cf. *Atwood v. Humble Oil & Refining Co.*, 5 Cir., 1957, 243 F.2d 885, 888. What an attorney does and says in the give and take of adversary litigation carry at least a prima facie presumption of honesty and accuracy.

Even if this were not true, the record brought before us by the appellant fails to furnish any proof to warrant our holding that the challenged rulings were error. The Government's case as to the crime charged rested essentially upon the testimony of Von Kehler, Fabian and Agent Hun-

ton. Beyond question, all statements and memoranda of these three were turned over to the appellant.

The residue of the Government's file, as the record before us reveals without contradiction, consisted of reports by agents who had no connection with the events which led to the appellant's conviction, and with no indication that any one of them contained any reference to any witness whom the Government had placed on the stand or any "statement" under the Statute's definitions. These reports belong, at least prima facie, to the category of statements which do not "satisfy the statutory limitations" and come within the boundaries prescribed by the Supreme Court in *Palermo:* "Thus the Government will not produce documents clearly beyond the reach of the statute for to do so would not be responsive to the order of the court."

In this state of the record it was incumbent upon the appellant as movant to establish, by some proper showing, the probability that the absent reports came within the purview of the Statute.[9] Under any theory, he carried the burden of seeing that they were "preserved in the record" under procedures specifically provided in the Statute so that their materiality under it might be considered by this Court. This he failed to do. Instead, he asked the court to suspend the trial and examine the entire Government file, piece by piece, to see if any item might be discovered which would come within the reach of the Statute.[10] He failed.

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[9]In *Palermo* it is stated: "It is also the function of the trial judge to decide, in light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement."

[10]It will be observed that access to the grand jury testimony in *Pittsburg Plate Glass* was denied by the lower court chiefly "on the breadth of petitioner's claim."

moreover, to accept the offer made in appellee's brief to submit the statements in question to us for consideration. Aside from the clear showing of the harmless character of the trial court's action—cf. the holding and language of *Rosenberg, supra*—and the fact that there was no showing at all that it had abused the discretion vested in it by the Statute and the Supreme Court cases listed in Note 7, appellant is not in position to claim that the trial court committed error in the challenged ruling.

Reaching, as we do, the conclusion that the case was well and fairly tried in the court below and that the claims of error by appellant are without merit, the judgment is

AFFIRMED.

APPENDIX B.

18 U.S.C. 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (June 25, 1948, c. 645, 62 Stat. 701.).

18 U.S.C. 545. SMUGGLING GOODS INTO THE UNITED STATES

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchan-

dise after importation, knowing the same to have been imported or brought into the United States contrary to law —

Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section shall be forfeited to the United States.

The term "United States", as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Guam. (June 25, 1948, c. 645, 62 Stat. 716.)

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GUY JOHNSON, of
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WEGMANN & MOULEDOUX
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PROOF OF SERVICE

I, GUY JOHNSON, one of the attorneys for petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for Writ of Certiorari on Hepburn Many, United States Attorney for the Eastern District of Louisiana, Federal Office Building, New Orleans, Louisiana, And, the Solicitor General of the United States Department of Justice, Washington 25, District of Columbia, by mailing a copy thereof, "postage prepaid" to the addresses here noted.

GUY JOHNSON
2206 American Bank Building
New Orleans 12, Louisiana

BRIEF FOR THE

UNITED STATES

FILE COPY

FILED

[redacted]

[redacted]

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 412

ELMO M. BADON, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A, 16-31) is reported at 269 F. 2d 75.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on July 15, 1959 (Pet. App. A, 1). A petition for re-

[1] The record consists of two volumes which are consecutively paginated.

hearing was denied on August 25, 1959. The petition for a writ of certiorari was filed on September 18, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether petitioner was entrapped into committing the offenses for which he was convicted.

STATUTES INVOLVED

18 U. S. C. 545 provides in pertinent part:

> Smuggling goods into the United States.
>
> Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced * * * or
>
> Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—
>
> Shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

* * * * *

19 U. S. C. 1448, provides in pertinent part:

> Except as provided in section 1441 of this title (relating to vessels not required to enter), no

merchandise, passengers, or baggage shall be unladen from any vessel or vehicle arriving from a foreign port or place until entry of such vessel or report of the arrival of such vehicle has been made and a permit for the unlading of the same issued by the collector: * * *.

* * * * * *

19 U. S. C. 1453, provides as follows:

If any merchandise or baggage is laden on, or unladen from, any vessel or vehicle without a special license or permit therefor issued by the collector, the master of such vessel or the person in charge of such vehicle and every other person who knowingly is concerned, or who aids therein, or in removing or otherwise securing such merchandise or baggage, shall each be liable to a penalty equal to the value of the merchandise or baggage so laden or unladen, and such merchandise or baggage shall be subject to forfeiture, and if the value thereof is $500 or more, the vessel or vehicle on or from which the same shall be laden or unladen shall be subject to forfeiture.

STATEMENT

Petitioner was convicted in the District Court for the Eastern District of Louisiana of receiving and concealing Scotch whiskey known to have been smuggled into the United States, and of conspiring with two German seamen to commit customs offenses. The German seamen pleaded guilty to smuggling and conspiracy, and testified for the government (R. 6). Following a trial by jury, petitioner was found guilty and was sentenced to serve a term of imprisonment of eighteen months and to pay a fine of $1,000 (R. 435, 440). On appeal, the judgment was affirmed (Pet. App. A, 16-31).

The evidence may be summarized as follows:

In late February 1958, Richard Von Kehler, a German seaman, gave two bottles of untaxed whiskey to a fellow seaman to sell while their ship was docked in New Orleans, Louisiana (R. 59-61). Von Kehler observed his friend take the whiskey into the Moulin Rouge Nightclub where petitioner was employed and, after a few minutes inside, the friend returned and gave Von Kehler six dollars (R. 61).

At about midnight of April 30, 1958, Von Kehler spoke with the petitioner in the Moulin Rouge and asked the petitioner whether he would like to buy whiskey again (R. 57-58, 62-63). Von Kehler, on direct examination, testified as follows:

> A. I asked—I told him that I am from the German Ship MONTAN: if he would buy whiskey again.
>
> Q. And what did he say?
>
> A. He said yes.
>
> Q. Was there anymore [*sic*] conversation?
>
> A. Yes, I told him that there would be more whiskey than the last time and—he asked me how much and I said "probably more than a hundred bottles" and he told me that he probably wouldn't be able to pay all at once if I would bring it that very night and he would probably pay me only for a hundred bottles and give me a check for the rest of the bottles and I should come the next day and give him the check back and he would give me the money for the rest of the bottles.
>
> Q. Now was anything else said between you and Mr. Badón?
>
> A. Yes, I asked him at last if he—if he would be able to give me a car or anything like that for to bring that whiskey from aboard ship to the club and he said no, I just should take a taxi cab. [R. 63; see R. 105, 113-114.]

When informed that the whiskey did not bear the appropriate Louisiana tax stamps, petitioner said it did not matter, that Von Kehler should just bring the whiskey (R. 64).

Von Kehler then returned to the ship, awakened his friend, Fabian, and told him that he had a buyer for the whiskey (R. 64, 134-135). Von Kehler and Fabian packed the whiskey, which had previously been stolen from the ship's cargo, into suitcases (R. 57, 64-65, 133-134) and, while loading the suitcases into a taxi parked on the wharf, were arrested by Customs Agents (R. 64-65, 147, 175).

Von Kehler and Fabian were brought to the Customs Building where they refused to disclose the buyer or go through with the sale (R. 65, 108, 177, 258). They were then taken to the Orleans Parish Prison. At about 9:30 a.m. of the same morning, May 1st, Von Kehler and Fabian were returned to the Customs Building for interrogation (R. 65, 177). When asked why he would not go through with the delivery of the whiskey, Von Kehler volunteered that he would go through with it then (R. 287). Von Kehler and Fabian agreed to sell the whiskey, although no promise of immunity or reward was offered them (R. 66-67).

At about 11:00 p.m. that evening, Customs Agents discussed the delivery operation with Von Kehler. It was pointed out that, inasmuch as an agent would accompany Von Kehler inside the Moulin Rouge, it would be helpful if Von Kehler would repeat to the petitioner, in the agent's presence, that the whiskey came from the ship (R. 112-113, 280-281, 307-308, 312, 326).

At about midnight, Von Kehler and Agent Hunton, who posed as a German seaman, entered the Moulin Rouge. Von Kehler told the petitioner that he had difficulty getting the whiskey off the ship, that the whiskey was outside, and asked whether it should be brought in (R. 68, 197-198). Petitioner told him to bring the whiskey in, and he ushered them into a back room (R. 68, 198). Petitioner then told them to close the door, open the suitcases, and stack the bottles on the table (R. 198-199). Two suitcases were unpacked, and petitioner, with his manager, inspected the bottles. Petitioner inquired as to the other bottles and requested that they also be brought in (R. 69, 199).

During an interval when the petitioner was out of the room, Agent Hunton instructed Von Kehler to tell the petitioner that the whiskey was stolen, that they had difficulty getting it off the ship, and that it did not have any Louisiana tax stamps (R. 70, 119-120, 226). When petitioner returned, Von Kehler gave him this information (R. 70, 120, 200), but petitioner said that it did not matter and that he would take the whiskey (R. 70, 120, 200). When Von Kehler asked about the price, the petitioner said, "We'll see that later" (R. 71; see R. 200). The 109 bottles of whiskey were unpacked, petitioner left the room to get the manager for a count of the bottles and to bring back the money to "settle up" (R. 71, 200). Petitioner was then arrested outside the back room by Customs Agents. He said that two German seamen were in the back room with whiskey for sale, that petitioner thought they only had about a case for sale, and that after he discovered that the whiskey did not have the Louisiana stamps, he, the petitioner,

informed the seamen that he wasn't particularly interested (R. 300-301; see R. 201-202, 248). When Agent Hunton identified himself, petitioner stated that he had nothing to say until he saw his lawyer (R. 202, 302).

ARGUMENT

There is no merit to petitioner's contention (Pet. 7-15) that he was unlawfully entrapped or that the conduct of the federal agents "disregard[ed] the rights of the individual" in the circumstances of this case. It is well settled that, in their efforts to apprehend criminals, federal officers may afford opportunities and facilities for the commission of an offense, and that unlawful entrapment is established only when the criminal design originates with the federal officers and an otherwise innocently disposed person is induced to commit an offense. *Sherman* v. *United States*, 356 U. S. 369, 372, 376-377; *Sorrells* v. *United States*, 287 U. S. 435, 441-442, 451. Von Kehler's testimony is uncontradicted that the agreement to sell whiskey to petitioner was entered into on April 30th before the federal officers had any knowledge of the case.[2] This fact was corroborated by the events

[2] Petitioner's argument (Pet. 5-15) is replete with gross exaggerations of fact unsupported by the record. For example, petitioner argues that "Badon had made no deal, no quantity or price had been established and no delivery plans had been formulated" (Pet. 7) when the uncontradicted testimony of Von Kehler revealed that an agreement with the petitioner had been reached on April 30th for the purchase from Von Kehler of over 100 bottles of whiskey, that petitioner said that he wouldn't be able to pay for all the whiskey at once, that petitioner would give Von Kehler a check for a portion of the whiskey, that petitioner wanted delivery that night, and that petitioner told Von Kehler to use a taxi to bring the whiskey (R. 62-64; see R. 105, 113-114). Again, petitioner argues that "the agent [Hunton] overheard only the simple commitment of Badon to the effect that

on the evening of May 1st when petitioner, informed that the whiskey was outside, requested that the whiskey be brought inside the nightclub and went ahead with the arrangements to purchase when apprised that the whiskey was stolen and that it did not bear the Louisiana tax stamps. See the Statement, *supra*. Nothing in the record indicates that petitioner was unwilling or reluctant to purchase the whiskey when presented with an opportunity to do so on May 1st.

The trial court thus properly ruled that entrapment was not established as a matter of law (R. 407) but was for the jury. On ample evidence, the jury found against the petitioner.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

OCTOBER 1959.

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he would look at the liquor" (Pet. 10). Hunton's uncontradicted testimony, however, indicated that Von Kehler told the petitioner that he, Von Kehler, had trouble getting the liquor off the ship, that the liquor did not bear Louisiana tax stamps, and that petitioner said he would take the whiskey despite the lack of Louisiana tax stamps (R. 198-200; see R. 68-71).

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